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No. 90-1342

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent attempts in his brief in opposition to persuade the Court that this case involves only the application of settled principles to particular facts, and also to show that there is no conflict between the circuits. Both attempts fail. The case presents an important question of law on which the circuits are squarely divided.

1. As the case comes to this Court, there is no longer any dispute between the parties about whether respondent reasonably feared that he would be forcibly recruited by the guerrillas if he returned to Guatemala. The *sole* question in the case is whether

respondent's fear of forcible recruitment is a fear of persecution "on account of * * * political opinion" within the meaning of the Refugee Act of 1980, 8 U.S.C. 1101(a)(42)(A). The court below held that it is, because "there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group's* political goals." Pet. App. 18a.[1]

a. For reasons stated in our petition (at 14-20), we strongly disagree with the Ninth Circuit's rule that, at least in the absence of proof to the contrary, one threatened with harm when a group seeks to further its political goals is necessarily being persecuted on account of *his* political opinions. The implications of that rule extend beyond forcible recruitment to all victims of factional political violence—indeed, to anyone threatened not because of his political beliefs but because of the political nature of a group's objectives and the means it chooses to attain them.

[1] Respondent attempts to cloud this straightforward question at a number of points. For example, he argues, Br. in Opp. 12-13, that the court below viewed the case as involving the attempted recruitment and indoctrination of the entire Zacarias family. Whatever evidence there may be for such an inference, it is clear that the court below viewed the case as involving only the forced recruitment of respondent himself. The phrase quoted in text is the entire ground for the court's conclusion that respondent was threatened with persecution on account of his political beliefs.

At another point, respondent interprets our brief as claiming that "the guerrillas only wanted to recruit *apolitical* fighters for their army." Br. in Opp. 13. Of course, we make no such claim. To the contrary, recruitment of political neutrals *because* they are neutrals would be "on account of" the conscripts' political opinion, while conscription of able-bodied males regardless of their political beliefs would not.

Nor can the result below draw support, as respondent seems to think, Br. in Opp. 13 nn.15-17, from the possibility that the guerrillas may agree with Che Guevara that guerrilla fighters, once recruited, must be indoctrinated in the guerrillas' cause. See point 2, *infra*.

That the Ninth Circuit has such a rule is fully borne out not only by its opinion in this case but by the cases cited by respondent. Thus, as respondent recognizes, Br. in Opp. 6 n.6, a number of Ninth Circuit decisions uphold claims of persecution on similar facts. And the only Ninth Circuit cases offered (*id.* at 11) to show that the question here is just an evidentiary one in fact serve to underscore the vitality of that court's rule. Thus, in *Rodriguez-Rivera* v. *INS*, 848 F.2d 998 (9th Cir. 1988) (per curiam), the claim of persecution was rejected only because the panel concluded that the threat to the claimant was not a threat on behalf of the guerrillas as an organization but rather was a purely personal threat from an individual who was no longer alive. *Id.* at 1006. And in *Florez-De Solis* v. *INS*, 796 F.2d 330 (9th Cir. 1986), the case did not involve forcible recruitment at all. Rather, the question was whether a particular threat of reprisal was based on the guerrillas' identification of the alien with the political views of her employer. *Id.* at 335.

b. Respondent attempts to deflect attention from the important legal issue presented by asserting—more than 12 times, Br. in Opp. 3, 4, 5, 6, 9, 10, 11, 12 n.14, 13—that the guerrillas threatened him for "political motives" and that our petition "rests on the argument that the Ninth Circuit acted inappropriately when it *inferred* that the guerrillas were motivated by political purposes," *id.* at 10. As our petition made clear, Pet. 8-9, 11-13, 15-16, however, our disagreement is *not* with the *factual* deduction that guerrillas have political motives for threatening young men like respondent, but with the Ninth Circuit's quite different *legal* inference (or presumption, see Pet. 16-17 nn. 9-10) that politically-motivated threats necessarily constitute persecution "on account of * * * political opinion." When a person receives a threat that is issued in order to achieve a political objective, it does not follow that the person has been threatened "on account of" his politi-

cal opinions.[2] In this case, in fact, the Board of Immigration Appeals specifically stated that the guerrillas sought to recruit respondent only so that he could assist them in their efforts to overthrow the Guatemalan government—"even offer[ing] to pay the respondent for his services." Pet. App. 32a. Under these circumstances, the BIA concluded, "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent *for having opinions they found offensive*." *Id.* at 32a-33a (emphasis added).[3] Respondent's brief is puzzlingly blind both to the basis of the BIA's decision and to the important legal issue raised by the Ninth Circuit's erroneous holding in this case.

2. Respondent's efforts to deny the existence of a circuit conflict are equally unavailing. Like the present case, the Eleventh Circuit's decision in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292 (1990) (per curiam), involved an alien who feared that harm would come to him because he refused to serve in a guerrilla force (in Perlera Escobar's case, in El Salvador). In direct contrast to the court below, the

[2] The lower court's reliance on the political motivation for the guerrillas' threat does serve to distinguish this case from *INS* v. *Cañas-Segovia*, No. 90-1246 (filed Feb. 6, 1991). The Ninth Circuit there held that, in the circumstances of government recruitment of a conscientious objector, asylum eligibility does not require *any* proof of the alleged persecutor's motivation. 90-1246 Pet. App. 17a-19a. Here, on the other hand, the Ninth Circuit did look to the persecutor's motivation but then held that proof of motive to persecute an individual "on account of * * * political opinion" is satisfied by evidence of the alleged persecutor's political motivation. Thus, reversal of the judgment in *Cañas-Segovia* would not necessitate reversal of the judgment in this case. We therefore urge the Court to grant the petition here as well as in *Cañas-Segovia*.

[3] In light of the BIA's finding, respondent is entirely in error in suggesting that the agency is not entitled to *Chevron* deference in its view of the statute because "neither the Immigration Judge nor the BIA based its denial of [respondent's] application on a finding that the guerrillas lacked a political motive." Br. in Opp. 12 n.14.

Eleventh Circuit rejected the alien's claim that any harm inflicted on him would be "on account of * * * political opinion," reasoning that "the guerrillas care not what Escobar thinks or believes." *Id.* at 1298. Thus, the Eleventh Circuit could not have sustained the alien's claim in this case, as the Ninth Circuit plainly did, by simply "inferring" that as a result of respondent's unwillingness to further the group's political objectives by serving, he was threatened with harm "on account of" his political opinions.

There is, as respondent notes, Br. in Opp. 14-16, one factual difference between this case and *Perlera-Escobar*. Here, the alien was resisting forced recruitment, and there the alien had deserted the guerrilla force. But that difference only serves to intensify the conflict. If, as respondent contends, guerrilla groups are likely to attempt continual and pervasive indoctrination of their recruits, then one who deserts might perhaps be suspected of deserting because he rejects the guerrillas' creed. Those who are being recruited, on the other hand, are more likely to be pitied than censured for their political ignorance. Thus, the Eleventh Circuit would be even more resistant to the Ninth Circuit's approach in the context of recruitment than in the context of desertion.

For the foregoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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